

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





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75-1065, 1099

*To be argued by*  
THOMAS M. FORTUIN

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

Docket Nos. 75-1065, 75-1099

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

FRANK WINGATE and KENNETH LUKE SMITH,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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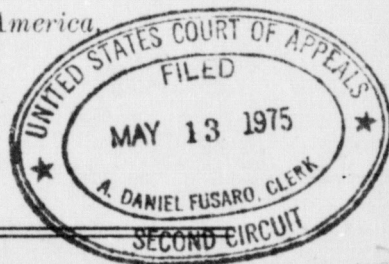
**BRIEF AND APPENDIX FOR THE UNITED STATES  
OF AMERICA**

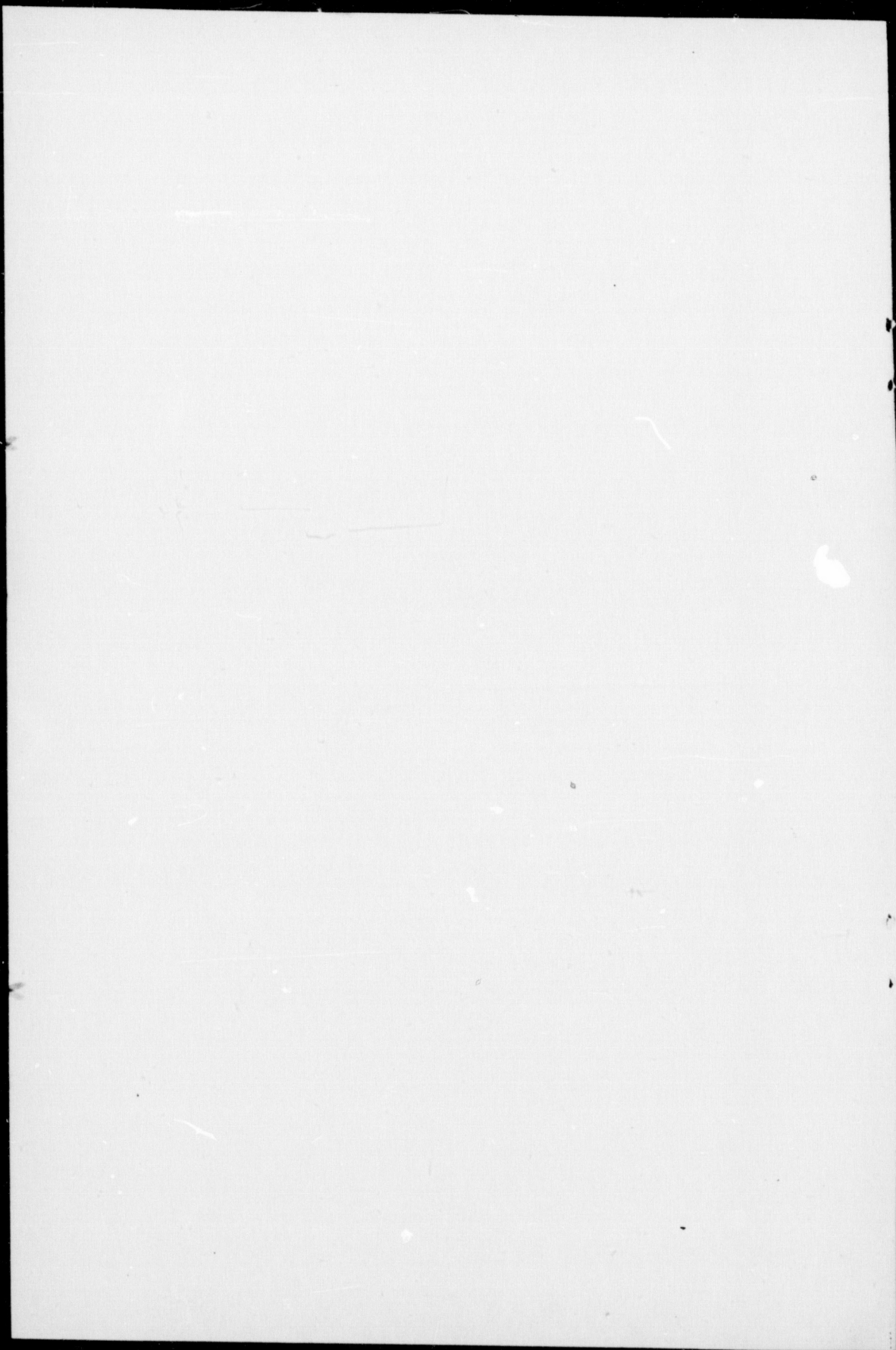
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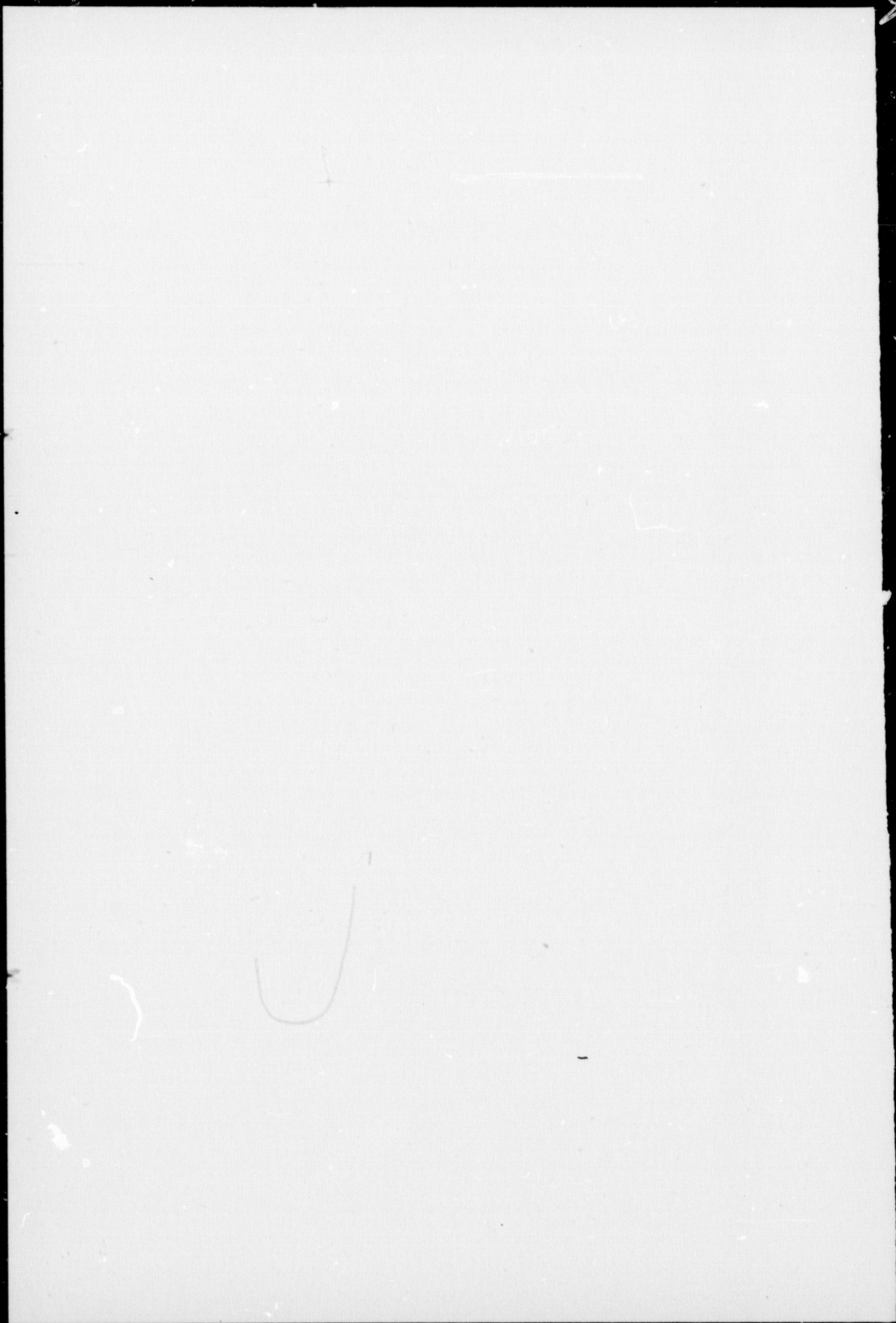
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Frank Wingate and Kenneth Luke Smith appeal from judgments of conviction entered on February 18, 1975 in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 74 Cr. 560, filed on September 10, 1974, charged the defendants Frank Wingate and Kenneth Luke Smith in Count One with conspiring from June 11, 1974 up to and including the date of the filing of the indictment to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846. Counts Two and Three charged Wingate and Smith with attempts to distribute approximately one-eighth (1/8) kilogram of heroin on June 14, 1974 and July 1, 1974, respectively in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.

A suppression hearing was held on December 27, 1974, on the voluntariness of Smith's post-arrest statements and Smith's motion to suppress these statements was denied.

Trial began on December 27, 1974. On December 30, 1974, Judge Frankel directed verdicts of acquittal as to both defendants on Counts Two and Three. On January 2, 1975, the jury found both defendants guilty on Count One.

On February 18, 1975, Judge Frankel sentenced Wingate to a term of imprisonment of three years and directed that Wingate be confined in a jail-type institution for a period of six months. Execution of the remainder of the sentence was suspended and Wingate was placed on probation for a period of three years. The District Court also imposed a special parole term of three years to begin upon the expiration of the period of confinement. Judge Frankel suspended imposition of sentence with respect to Smith and placed him on probation for three years.

Wingate is free on bail pending appeal and Smith is on probation.

## **The Facts**

### **The Government's Case**

On June 5th, 1974, Marell Tyre was arrested at the Miami International Airport in the possession of cocaine and later was charged with importing cocaine (Tr. 107, 110).<sup>\*</sup> Tyre immediately agreed to cooperate with the agents of the Drug Enforcement Administration ("DEA") and agreed to make a telephone call to one of his sources of supply for heroin in New York, the defendant Frank Wingate. That telephone call, made from the Miami Head-

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<sup>\*</sup> "Tr." refers to pages of the trial transcript; "H. Tr." to pages of the hearing transcript; "App." and "Br." to the appendix and brief of the specified defendant; "GX" to Government's exhibits and "GA" to pages of the Government's appendix.

quarters of DEA, was tape recorded and was played for the jury at trial (GX 1; Tr. 147; GA 9a-13a).<sup>\*</sup> As the tape revealed, it took Wingate and Tyre little time to get down to business and the conversation, from its inception, proceeded as follows:

Wingate: Hello.

Tyre: Hello, Frank?

Wingate: Yeah.

Tyre: Marrell.

Wingate: What's happening?

Tyre: Not too much, what's happening with you?

Wingate: Well everything is all right.

Tyre: Listen, err—I ran out on you last time without accomplishing anything because things got fucked up. I'm down here in Florida.

Wingate: Oh.

Tyre: I'm down here in Florida now and a friend of mine down here got some money he wants to spend.

Wingate: Yeah.

Tyre: Oh—can you do an eighth?

Wingate: Probably so.

Tyre: In the next day or so?

Wingate: When you—when you going to get here?

Tyre: Oh—anytime you can do it. I'm mean he's here with the money and everything right now.

Wingate: What kind of money he got?

Tyre: Oh—we're thinking about an eighth to start with—and maybe a week later about twice that.

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<sup>\*</sup> Counsel for both defendants agreed that the transcripts of the tapes were accurate (Tr. 147-48). At trial, the defendant Wingate testified in his own behalf. He testified that he had spoken to Tyre on the occasion indicated by the tapes and agreed that the transcripts presented at trial were accurate and accurately identified his voice, Tyre's voice and Police Officer Heyward's voice (Tr. 230-31).

Wingate: Oh.

Tyre: Can you handle that?

Wingate: Yea, I can do it.

Tyre: You can do that?

Wingate: Yea when you going to get here? (GX 1)

The conversation continued later as follows:

Wingate: The same way as before or the, all the way?

Tyre: All the way.

Wingate: All right.

Tyre: I mean for sure, you know, look go ahead and talk you know and get everything set up and err, just err, I'll call you back and err, oh yea about how much would an eighth . . .

Wingate: I'll have to check it out baby.

Tyre: Can you give me an estimate?

Wingate: Oh.

Tyre: Can you give me sort of a price?

Wingate: Oh.

Tyre: Close?

Wingate: Oh, you talking about, well listen now what I'm saying . . .

Tyre: Okay, like oh, I tell you what, you

Wingate: That's running up there now.

Tyre: Yea, I know.

Wingate: You know that, right?

Tyre: Yea, but it's what kind of quality are we gonna get?

Wingate: Hey, maybe a five or six.

Tyre: Yea?

Wingate: Yea.

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\* Police Officer Heyward, who had worked as a narcotics undercover agent on forty-five to fifty occasions, testified as an expert in narcotics jargon. He testified that "a five or six" referred to the number of times that narcotics could be diluted or "cut" and would refer only to heroin. Cocaine would not ordinarily be diluted so many times (Tr. 39-40).



Tyre: That's about the best. What if we got more the next time, can you get better quality?

Wingate: I don't know, baby.

Tyre: Well, would you check on that for me?

Wingate: You know how the situation is.

Tyre: Yea, I do. I know how the situation is and everything, but why, but I know you know a bunch of people, too. So just check. Just check with everybody you know and see who's got the best shit.

Wingate: Yea, well I do the best I can for you.

Wingate: Buf err, that estimate thing I'm talking about, err, that was running man back here was last year, yea, you know, it was running up there in the 6's, you know, 6 or 7, you know?

Tyre: Goddam Frank!

Wingate: Hey, well listen. I'm, hey, look here, I'm, I'm just saying.

Tyre: Yea I know. I know. I'm just saying, wow!

Wingate: I'm telling you, man.

Tyre: Yea we'll see what we can do.

Wingate: You know.

Tyre: You know, we'll get it together and I'll give you a call back.

Wingate: You don't give me any idea what kind of money there is, you know, there is.

Tyre: Well, we can get, you know like the people got plenty of bank, there be no problem at all with the money. I mean that's . . .

Wingate: Yea.

Tyre: They got lots.

Wingate: Yea.

Tyre: Err, that ain't going to be the problem, the problem, you know, as long as we can pull the thing off smooth and we can get good quality shit. You know?

Wingate: They'll but it?

Tyre: And buy a lot.

Wingate: All right. (GX 1)

Tyre then flew to New York (Tr. 125). On June 13, 1974, Tyre made additional phone calls to Wingate from the Holiday Inn located on 57th Street near the New York Headquarters of DEA (Tr. 125-28). These calls also were tape-recorded and played for the jury (GX 2; Tr. 147; GA 14a-44a). They related to the quality and the price of the heroin that Tyre was to purchase from Wingate (GA 14a-44a *passim*). Later in the day, Robert J. Heyward, a Police Officer with the New York City Police Department assigned to DEA (Tr. 25-26), was introduced over the phone by Tyre to Wingate. Heyward complained about the \$6,200 selling price for the heroin (Tr. 30), and arrangements were made thereafter for a meeting the following day (Tr. 31).

The next day Heyward and Wingate went to the Crotona Bar at 1475 Boston Road in the Bronx and met with Wingate (Tr. 31). After a discussion during which Wingate insisted that the entire \$6,200 purchase price be paid to him in advance before delivery of the heroin, Heyward agreed to give Wingate \$3,100, representing half the purchase price in advance, which he did (Tr. 33-36). Wingate took the money and left the bar at approximately 6:30 P.M. He returned a little over an hour later and walked into the men's room. There he returned the \$3,100 to Heyward. Wingate explained that when he left the bar he had seen someone following him and refused to sell the narcotics under these circumstances (Tr. 36-37). Wingate agreed to call Tyre to make arrangements for another method of delivery (Tr. 37-38).\*

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\* Heyward was wearing a concealed transmitting device and some of his conversations with Wingate were overheard by Detective George Taylor who was listening to the monitoring device for the transmitter in a nearby car (Tr. 182-190).

Wingate, however, did not call Tyre, and Tyre returned to Florida (Tr. 77). Shortly thereafter, Tyre went to Virginia where he had another telephone conversation with Wingate (Tr. 77). Wingate told Tyre that if he was "interested in doing that deal, he could do it anytime" and that Tyre should come to New York immediately, if possible (Tr. 77-78). Tyre contacted DEA and flew to LaGuardia Airport on July 1, 1974 (Tr. 78, 134). At the airport Tyre called Wingate at the Crotona Bar at about 10:00 P.M. He informed Wingate that he was in Philadelphia, that his flight had been held over, and that he needed to purchase the narcotics quickly, preferably near the airport, so that he could return home that night (Tr. 79). Tyre called Wingate back later that evening, and Wingate agreed to come to the airport to talk to Tyre about the sale of the heroin. Wingate told Tyre that he was going to bring "his man" with him (Tr. 80).

At approximately 2:10 A.M. on July 2, 1974, DEA agents saw Wingate get out of a car and meet with Tyre in front of the American Airlines Terminal on the downstairs level of the terminal building (Tr. 36). Wingate told Tyre he "wasn't sure what was going on but that the whole thing created too big a problem." Wingate then noticed two of the DEA agents who were conducting surveillance sitting in a car nearby and pointed them out to Tyre. Wingate refused to do "the deal" unless Tyre went alone with him to the Crotona Bar and gave Wingate half the purchase price in advance (Tr. 81-82).

Kenneth Luke Smith then drove up in the car in which Wingate had been riding, and Wingate instructed him to drive by the car that Wingate had referred to containing the two agents. Wingate told Smith to determine why the two men were sitting down low in the car to see if Smith could tell what they were doing (Tr. 82). Smith told Wingate to "hurry up" (Tr. 82). Wingate then got into the car, and



Smith drove him to the north end of the airlines terminal, where Wingate got out of the car (Tr. 193). Wingate walked part way up the airlines terminal staircase, crouched down, and looked back to observe the location that he had just come from (Tr. 193). Smith continued driving in a circular pattern around the airport and picked up Wingate (Tr. 137). At this point Wingate and Smith were arrested by DEA agents (Tr. 194).

Special Agent Korniloff of DEA arrested Smith, placed him in his car and drove him to Regional Headquarters (Tr. 195). In the car, Korniloff advised Smith of his constitutional rights and Smith answered that he understood.\* At that time, Smith stated, "That he had just met an individual at the Crotona Bar prior to that and that the individual asked him to assist him by giving him a ride to LaGuardia Airport, which he did" (Tr. 196).

At DEA headquarters Korniloff again read Smith his constitutional rights, and Smith again indicated that he understood (Tr. 197-198). A discussion followed in which Smith admitted his involvement in the intended delivery of an eighth kilogram of heroin.

At trial, Korniloff testified about his conversation with Smith as follows:

Q. What conversation did you have with him at that time?

A. I then advised Mr. Smith what was going to happen for the balance of the evening, that we would take him to the Federal House of Detention and the next morning he would be arraigned before a magistrate.

At that time Mr. Smith inquired as to what was going to happen to his vehicle, the vehicle we took from him at the airport.

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\* No claim is made on appeal that the advice of rights, which was administered at least three times, was in any way inadequate.



I told Mr. Smith that I was going to see if it was subject to seizure, I was going to check with my supervisor to see if it could be seized.

At that time Mr. Smith became anxious and stated the vehicle was owned by his girl friend and that he had hurt the woman so many times before and he couldn't hurt her this one more time.

At that time he said that he had met an individual earlier that evening at the Crotona Bar and that this individual had asked him to obtain some heroin for him for a customer who he intended to later meet at LaGuardia Airport.

Mr. Smith told this individual that he could obtain the heroin from a Mr. Bumpsie who lives on 223rd Street in Manhattan but that he would need the money for the drugs that same evening or before they could obtain the drugs.

So they both got into Mr. Smith's vehicle and went to LaGuardia Airport to meet the individual and obtain the money.

This didn't happen, of course, the individual did not have the money and thereby he couldn't obtain the drugs. (Tr. 198-99)

The following day, Smith was interviewed by Assistant United States Attorney Daniel H. Murphy, II, in the presence of DEA Agents Magnuson and Sullivan. After being advised of his constitutional rights, Smith talked with Assistant United States Attorney Murphy about the facts of the offense. This conversation was reduced to writing by Murphy and was signed by Smith:

"Defendant's statement:

Q. *O.K. you're charged with Frank Wingate of conspiring to sell heroin. Do you understand that charge.*

A. *Yes.*

Q. You told the agent you were going to get the heroin from Bumpy, is that right?

A. That's right.

Q. How much heroin was it?

A. Well he didn't know exactly what it was but he must have thought maybe it was an eighth.

Q. Was Bumpy waiting for you last night?

A. No.

Q. How were you going to get in touch with him.

A. Well I'd ive seen him, gone around to his house.

Q. Where's Bumpy's house?

A. 223rd Street?

Q. What's Bumpy look like?

A. Short, stocky, wear glasses. About 42, 43

Q. Does he have bumps on his face.

A. Yeah, shaving bumps.

Q. What color is he.

A. Black.

Q. Where does he live on 223rd Street

A. 2nd floor, 1063.

Q. How much were you going to get for this.

A. I couldn't tell you. I'd probably've took some of it, took some of the money, if there was some money.

Q. *What was Frank Wingate supposed to do.*

A. *He might of.*

Q. *He set it up, right, he set you up?*

A. *Right.*

Q. I show you this statement, read it, if you have any corrections, make them, if it's true and correct sign it.

A. /s/ Kenneth Smith." (GX 3; Wingate's App. D).

A xerox copy of this statement was received in evidence at trial (GX 3) with the italicized portions referring to Wingate masked over.

## The Defense Case

Wingate testified in his own behalf. Wingate admitted that the tape recorded conversations had occurred, admitted that he had met with Police Officer Heyward on June 14, 1974 (Tr. 230-31) and had negotiated with him for the sale of narcotics (Tr. 231). He testified that he had approached a person by the name of "Ray" for the purpose of obtaining the heroin (Tr. 230-233). He admitted that on the evening of July 1, 1974, he had met Smith at the Crotona Bar and had asked Smith to drive him to LaGuardia Airport, which Smith did (Tr. 241-243). He testified, however, that Smith had no part in any agreement to sell or possess narcotics (Tr. 244) and that Smith didn't know why Wingate was going to the airport.

On cross-examination, Wingate testified as follows:

Q. Now, Mr. Wingate, as I understand it, you said you went to a person by the name of Ray to obtain narcotics, is that correct?

A. Yes.

Q. You told him that you wanted to buy narcotics, is that correct?

A. Yes.

Q. And he agreed that he could supply the narcotics, is that correct?

A. Yes.

Q. And you agreed that you would buy them?

A. Yes, I did.

Q. Ultimately, you received \$3,100 for the purpose of purchasing these narcotics, correct?

A. I did.\*

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\* Overt Act 4 of the indictment charged:

"On or about June 14, 1974, the defendant Wingate accepted \$3,100 from an undercover officer of the Drug Enforcement Administration as advance payment for a sale of narcotics."

Q. And the reason that you didn't go through with that transaction was because you noticed that there were police officers nearby and you were afraid that you might be apprehended?

A. Yes, I would say so, yes (Tr. 250-51).

On cross-examination by Smith's lawyer, Wingate stated that after Smith and he were arrested, Smith had asked Special Agent Sullivan for medical attention (Tr. 283) and had exhibited signs of heroin withdrawal (Tr. 284-285). He further stated that at the Federal Detention Headquarters at West Street, Smith had asked for medication but had received none (Tr. 285) and that Smith had been bent over and "constantly moving around" while he was interviewed by Assistant United States Attorney Murphy (Tr. 286).

Wingate also sought to call Smith to the witness stand (Tr. 298). After Smith's attorney stated that Smith would invoke the Fifth Amendment, Wingate offered in evidence the transcript of Smith's testimony at the suppression hearing (Tr. 301-02). Wingate's offer was refused by Judge Frankel (Tr. 303-04).

### **The Government's Rebuttal Case**

In rebuttal, Special Agent Sullivan of DEA testified that Smith had not asked for medical attention after his arrest on July 2, 1974, and, that, with respect to drugs, Smith had stated only that he used cocaine and made no mention of using heroin (Tr. 305-08).



## ARGUMENT

### POINT I

#### **Smith's Claim That The Evidence Was Insufficient Is Frivolous.**

Smith claims that the evidence was insufficient to convict him. This claim is frivolous.

Under 21 U.S.C. § 846 the crime of conspiracy is established with proof of an agreement among two or more persons to commit an offense under subchapter I of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, and proof that the defendant knew of the existence of the conspiracy and intended to participate in the unlawful enterprise. No overt act need be proved. *Irizarry v. United States*, 508 F.2d 960, 966 (2d Cir. 1974).

Here, after lengthy negotiations concerning the sale of an eighth kilogram of heroin, Wingate agreed to meet Tyre at La Guardia Airport to discuss the sale and stated that he would bring his "man" with him. Smith then drove Wingate from the Crotona Bar to La Guardia Airport and assisted him in "casing" the area. Smith's role is overwhelmingly corroborated by the statement he signed in which he said that he was going to obtain the eighth of a kilogram of heroin and share in the proceeds of the narcotics transaction (GX 3). The evidence, viewed in the light most favorable to the Government, was more than sufficient to sustain the verdict. *United States v. Tramunti*, Dkt. No. 74-1550 (2d Cir. March 7, 1975), Slip op. 2107, 2144-48; *United States v. Mallah*, 503 F.2d 971, 975-976 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3511 (March 25, 1975); *United States v. D'Amato*, 493 F.2d 359, 362-65 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3208 (October 15, 1974); *United States v. Manfredi*, 488

F.2d 588, 596-597 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States v. Barrera*, 486 F.2d 333, 337 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States v. Vasquez*, 429 F.2d 615 (2d Cir. 1970).

## POINT II

### **Smith's Statements Were Properly Admitted In Evidence.**

Smith claims that his post-arrest statements should have been excluded because they were obtained after an arrest that was not based on probable cause and because they were induced by false representations by the arresting agents. These claims are also frivolous.

Smith's claim that his arrest was not based on probable cause was made for the first time on the morning of the suppression hearing. Judge Frankel properly denied the motion as untimely (H. Tr. 12-14). Prior to the suppression hearing, Smith's attorney as directed by Judge Frankel (see Smith's App. 50) submitted an affidavit from Smith sworn to November 19, 1975 in support of a motion to suppress the statement taken from Smith after his arrest (GA 1a-2a). This affidavit alleged that the statement was involuntary for various reasons, none of which are pressed on appeal and requested a hearing on the "voluntariness" of Smith's statements (GA 1a-2a). The affidavit did not allege that the arrest was invalid because it was not supported by probable cause. After the defense received the 3500 material in this case, Smith's attorney moved for the

first time to suppress the statement on the ground that it had been taken after an arrest not based on probable cause.\*

This Court has unequivocally held that motions to suppress made for the first time, on the eve of or during a trial are properly denied without hearing. *United States v. Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3256 (October 29, 1974); *United States v. Sisca*, 503 F.2d 1337, 1347-49 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3281 (November 11, 1974).

In any event, it is abundantly clear from the record that the agents had more than sufficient probable cause to arrest Smith. At 1:30 A.M. on July 2, 1974, the informant, Tyre, telephoned Wingate in the presence of two DEA agents, told him that he was in New York and said that he wanted Wingate\*\* to bring the heroin to the airport. Wingate told Tyre that he and his "man" would meet Wingate in front of the American Airlines office at La Guardia Airport to make arrangements for the sale of an eighth of a kilogram of heroin (Smith's App. 53, 59).

At approximately 2:15 A.M. surveilling agents observed Wingate meet with Tyre at the American Airlines office at the main arrival and departure building at La Guardia airport. A short time later one of the agents observed Smith walk from a nearby parking area and meet with

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\* The following exchange occurred between the Court and counsel for Smith:

The Court: Mrs. Barlow (counsel for Smith), is Mr. Fortuin correct that this motion is based on the 3500 material given to you?

Mrs. Barlow: Yes, it is . . . (H. Tr. 12).

\*\* From the tape-recordings of Wingate's voice and from Police Officer Heyward, the agents had highly reliable information that Wingate was trafficking in heroin and was attempting to locate a source for heroin.



Wingate and Tyre. About ten minutes later Tyre and Wingate returned to the parking lot where the agents lost sight of them. At approximately 2:45 A.M. Smith was observed driving a 1973 white Pontiac near the area of the American Airlines office. At this time Wingate was observed leaving Tyre and entering Smith's car which proceeded to the far north end of the main terminal building, where Wingate got out and began to "case" the area. Smith, under the surveillance of the agents, then drove around the airport and returned to the main terminal building, where Wingate reentered the car. (Smith's App. 53-54, 59-60.)

Agent Sullivan, who had met with the informant, then advised the other agents that Wingate suspected the presence of police. At approximately 3:00 A.M. Wingate and Smith were placed under arrest by Agents Magnuson and Korniloff. (Smith's App. 53-54.)

These facts unquestionably warranted the agents in concluding that Smith, whom Wingate previously had identified as his "man", was no mere innocent bystander, but was critically involved in the conspiratorial venture either as the source of the heroin to be sold or as the bodyguard so frequently used in narcotics transactions of this kind. *United States v. Del Toro*, 464 F.2d 520, 521 (2d Cir. 1972); *United States v. Santana*, 485 F.2d 365, 368 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

Under all these circumstances there was more than sufficient probable cause for Smith's arrest for conspiracy to violate the federal narcotics laws. See *e.g.*, *United States v. Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. 2107, 2124-34; *United States v. Manning*, 448 F.2d 992 (2d Cir.) (*en banc*), *cert. denied*, 404 U.S. 995 (1971).



The claim that Smith was induced to make the statement upon the basis of false representations made by the DEA agents is likewise without merit. In the affidavit submitted in support of the motion to suppress the statement, Smith never made any such claim (GA 1a-2a). Nor did he make any such claim during his testimony at the suppression hearing (H. Tr. 50-81). If Smith actually had been induced to make the statement on the basis of these representations, certainly he would be aware of the relevant facts and allege them in his motion to suppress and testify to them at the suppression hearing.

Moreover, the agents made no false statement to Smith. The agent merely told Smith, "I was intending to speak to my supervisor and see if there was any way we could seize the vehicle", which Smith was driving at the time of the arrest and which was to be used to transport the heroin (H. Tr. 41-42). Smith argues, however, that since "no drugs had been transported in the vehicle" this statement "was not made in good faith" and then concludes that the statement "was conveyed as a threat to compel cooperation from appellant Smith" (Br. at 26). This argument is based on a mistaken view of the seizure law \* and pure conjecture.

Furthermore, the agent made no threat that the car would be seized unless Smith made a statement (Tr. 202), and, even if he had, that alone would not have rendered Smith's statement involuntary. *United States v. Pomares*, 499 F.2d 1220, 1221-22 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3306 (November 25, 1974); *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S.

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\* The car could have been seized even though no narcotics were transported. *United States v. One 1957 Lincoln Premier*, 265 F.2d 734, 736 (7th Cir.), *cert. denied*, 361 U.S. 828 (1959). The relevant seizure statute, 21 U.S.C. § 881(a)(4), provides that "All conveyances, including . . . vehicles . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment" of controlled substances are subject to seizure (emphasis added).

908 (1967); cf. *United States v. Miley*, Dkt. No. 2207 (2d Cir., March 19, 1975) slip op. 2363 at 2385-86; *United States v. Faruolo*, 506 F.2d 490, 493-94 (2d Cir. 1974).

Smith's claim that his condition was weakened because he was "sick from heroin withdrawals" (Br. at 18) was rejected by Judge Frankel,\* who went on to find, "There is nothing to persuade me that he was so pressured by the alleged addiction that he may not be thought to have been intelligent enough to make the waiver" of rights (H. Tr. 105).\*\*

### POINT III

#### **Wingate Was In No Way Prejudiced By the Admission Into Evidence of Smith's Statements.**

Wingate claims that he is entitled to a new trial because his rights under *Bruton v. United States*, 391 U.S. 123 (1968) were violated by the receipt in evidence of oral and written statements made by the co-defendant Smith. This claim is without merit. "*Bruton* extends only to situations where (1) 'testimony concerning the complaining co-defendant is clearly inculpatory . . . and (2) the testimony is vitally important to the Government's case.'" *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), cert. denied, — U.S. —, 43 U.S.L.W. 3208 (Octo-

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\* In support of his motion for a suppression hearing, Smith submitted an affidavit, drawn by and sworn to before his lawyer. The affidavit stated merely that at the time he gave the statements "I was a cocaine user" and never said Smith used heroin (GA 1a-2a). Judge Frankel found that the fact that Smith made no claim in that affidavit that he was withdrawing from heroin was "as devastating an answer to your motion [to suppress] as can be" (H. Tr. 104).

\*\* That the defendant was withdrawing from narcotics at the time of his statement does not, in and of itself, make the statement involuntary. *United States v. Harden*, 480 F.2d 649 (8th Cir. 1973); *United States v. Cox*, 487 F.2d 634 (5th Cir. 1973).

ber 15, 1974) quoting *United States v. Cassino*, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States v. Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). As Judge Frankel ruled below,\* neither condition is met here.

The statements were not "clearly inculpatory" of Wingate. Judge Frankel repeatedly instructed the jury to consider the statements only against Smith.\*\* Smith's written statement was redacted to eliminate any reference to Wingate. The witness who testified about the oral statement, which was received without objection, referred to Wingate simply as "another individual."

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\* Judge Frankel ruled as follows:

"The rule, as I get it from the cases you cited, is that the statement must contain evidence clearly inculpatory against your client and vital to the Government's case against your client.

"Now, I just don't know [how] you can read this statement in whatever context you are talking about with the excisions the Government has made to meet either of those tests . . ." (Tr. 121-22).

\*\* At the time that Smith's signed statement (GX. 3), was admitted in evidence, the Court instructed the jury as follows:

"I take it the Government is at this point going to elicit testimony about a statement said to have been made by the defendant Mr. Smith after his arrest.

"I am going to allow the evidence to come in but I instruct you, ladies and gentlemen, that since it was made by Mr. Smith, it must be considered exclusively as against him.

"It has no bearing one way or another on Mr. Wingate and you must keep that in mind as you consider it" (Tr. 140).

In the charge to the jury, the Court stated:

"You have heard of statements said to have been made by Mr. Smith following the arrest of both defendants in the early morning of July 2nd. Any statements that you find were made by Mr. Smith after the arrest may be considered only as against Mr. Smith. They have no bearing or significance with respect to Mr. Wingate" (Tr. 395).



Wingate argues, however, that the other independent evidence that Wingate accompanied Smith to La Guardia taken with Smith's oral admissions that he drove to La Guardia Airport to meet someone to obtain money for the heroin he was to deliver was "unmistakeably incriminating" of Wingate. (Br. 18-20). A similar argument was rejected by this Court in *United States v. Trudo*, 449 F.2d 649, 651-653 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972) which Judge Frankel relied on below (H. Tr. 19-21). There, Trudo and his brother made oral admissions concerning their participation in a bank robbery, which admissions were introduced at the trial. Other evidence established that Trudo and two others had been seen driving near the bank a couple of hours before and immediately before the time of the robbery and that the robbery had been committed by three people. Immediately after the robbery, the appellant Tatro and both Trudos were seen entering the Roostertail Bar near the robbed bank. On appeal, Tatro made a claim almost identical to that made by Wingate here:

Appellants claim however that the evidentiary context in which the admissions were introduced, were clearly inculpatory. George Tatro was placed in the Roostertail immediately after the robbery with the two men who had made the admissions; moreover, there was clear proof that three men had robbed the bank. (449 F.2d at 652).

This Court rejected that argument, stating:

The inference that if one defendant was guilty the co-defendants must also have been, is based not on the redacted confession but on the other independent evidence placing three men in the car "casing" the bank; the presence of three men in the bank; the presence of the appellants in the Roostertail after the robbery; the evidence of consciousness of guilt and newly acquired wealth—all of which evi-

dence was subject to full attack and challenge. In light of the careful instructions of the trial court, both at the time of the admission of the confession and in the final charge to the jury, that the admissions were to be considered only against the person making them and not against the co-defendants, and the substantial circumstantial evidence adduced, we see no reason to extend the *Bruton* principle. (449 F.2d at 653).

More importantly, the evidence of Smith's admissions was not "vitally important" to the Government's case against Wingate.\* The proof against Wingate was overwhelming based on his own confession on the witness stand to the crime charged in the indictment, the tape recordings of his voice; \* the accuracy of which he fully admitted during his testimony; the testimony of Police Officer Heyward and the surveillance agents; and the testimony of Tyre.

In any event, the limiting instructions given by Judge Frankel were, under the circumstances, adequate to protect Wingate's constitutional rights. *United States v. Sperling*, 506 F.2d 1323, 1339 n. 22 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3474 (March 3, 1975); *United States ex rel. Nelson v. Follette*, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *United States v. Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970); *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); See *Bruton v. United States*, *supra*, 391 U.S. at 135.

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\* Judge Frankel expressly found that the challenged evidence was not vital to the Government's case against Wingate: "How you can say [the Statement is] vital against your client really beats me, now that I have thought about it" (H. Tr. 21).

Wingate claims that the prosecutor acted "unconscionably," "mislead counsel to believe that the Government would introduce only the written statements of Smith," and "violated his duty to inform the Court and counsel, prior to trial, of his anticipated use of co-defendant's statement. *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974)" (Wingate Br. at 20-21). This accusation is completely false and appears to be based on a profound misunderstanding by Wingate's appellate counsel of the record in this case.

Before the trial began the prosecution notified defense counsel of its intention to offer both Smith's oral statements. In its bill of particulars, filed on December 23, 1974, the Government indicated that after his arrest Smith "gave oral statements in substance and effect the same as those given to Assistant United States Attorney Daniel Murphy prior to his [Smith's] arraignment the following day" (GA 3a). On December 24, 1974, the Assistant United States Attorney in charge of the case wrote a letter to Judge Frankel with copies to counsel for both defendants (GA 7a-8a). That letter was hand-delivered and counsel for Wingate admitted receiving it prior to the trial (Tr. 106). It reads as follows:

At trial of the above-captioned case, the Government intends to introduce against the defendant Smith certain written and/or oral statements made by him after his arrest. The Court of Appeals has held that any potential problems that might arise under *Bruton v. United States*, 391 U.S. 123 (1958), should be resolved prior to trial, *United States v. Glover*, Dkt. No. 74-1739, Slip Op. 33 at 45 (2d Cir., October 4, 1974). I am, therefore, enclosing a copy of the written statement of Smith which the Government intends to offer. I have circled in red the portion which inculpatates the co-defendant Frank Wingate and which I propose to delete for *Bruton* pur-



poses in submitting the statement to the jury. Of course, any witnesses to oral statements made by Mr. Smith will be instructed to avoid mention of anything which inculpates Mr. Wingate.

I believe that this procedure avoids any possible problem under *Bruton*. (GA 7a-8a).

Thereafter, the Assistant United States Attorney stated on the record that he intended to offer certain oral admissions, which were testified to at the suppression hearing (H. Tr. 41-42) and that he had instructed his witnesses to refer to Wingate as "another person" (Tr. 157). That trial counsel for Wingate was not in fact misled, as is now claimed, is plain from the fact that the testimony with respect to Smith's oral statements was received without objection from either counsel (Tr. 198).\*

Similarly, the claim that the prosecutor in summation drew "all the necessary but improper connecting lines" attempting to implicate Wingate by Smith's statements (Wingate Br. at 19) is purely fanciful. In fact, the prosecutor scrupulously avoided any inference that Smith's statement should be considered against Wingate. With respect to Wingate, he argued, "We have in (sic) Wingate's words about what he was charged with doing in the indictment" (Tr. 368). Then, after discussing Wingate's testimony in which Wingate admitted participating in a conspiracy to sell narcotics and the tape-recordings containing Wingate's voice, the prosecutor stated, "Now let us look at situation of Mr. Smith because you also have the words directly out of his mouth" (Tr. 370). It was only then, during that portion of the summation dealing with Smith, that the prosecutor made any reference to Smith's statements (Tr. 373).

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\* Nor did Wingate's trial counsel raise any objection during his lengthy motion for a new trial that he had been misled by the prosecutor (Tr. 424-38).

The further claim that the Government counsel's reference to certain deletions in reading Smith's statement to the jury \* were intended to imply that the deleted matter referred to Wingate is simply the product of appellate counsel's fertile imagination, since it ignores both what was said and the fact that other more damaging matters—Smith's criminal record, for example—were deleted from the statement (Tr. 329).

#### POINT IV

#### **Smith's Testimony At The Suppression Hearing Was Properly Excluded.**

Wingate argues that since Smith was unavailable to him as a witness at trial by virtue of his invocation of the Fifth Amendment privilege, he should have been permitted to read Smith's suppression hearing testimony which Wingate claims would show that Smith's post-arrest statement was false. The refusal of the trial court to permit introduction of that suppression testimony is alleged to be reversible error. The claim is without merit.

First, since Smith's statement was not admitted against Wingate \*\* and, by virtue of the redaction and the trial court's limiting instructions did not implicate him, Smith's prior testimony, as far as Wingate was concerned, was

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\* At the time he read Smith's statement (GX 3) to the Jury, the Assistant stated:

I am going to read from this statement and we will provide you with a copy with certain deletions on it with respect to matters that the Court has held are not admissible evidence (Tr. 143).

On summation the Assistant stated:

We will give you a xerox of that [GX 3] if you want to look at it because we blocked out certain matter you need not consider (Tr. 373).

\*\* Point III, above.



wholly irrelevant. Consequently, Judge Frankel's exclusion of this proffered evidence was well within his broad discretion. *United States v. Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974); *United States v. Roemer*, Dkt. No. 74-2677 (2d Cir. April, 1975) slip op. 2773, 2784-86.

Secondly, Smith's testimony was not in anyway exculpatory of Wingate.\*\*

Moreover, the unfairness to the Government of admitting Smith's prior testimony is manifest. If Smith had testified at the trial, the Government could have asked him about Wingate's involvement and cross-examined him using Smith's prior statement implicating Wingate. Without Smith's testimony on the stand, however, the Government could not bring out that fact that he had implicated Wingate. Wingate's offer was an attempt, as Judge Frankel recognized, to use *Bruton v. United States*, *supra*, as a "sword and a shield" (Tr. 304).

For the testimony to be admissible, it was necessary for the Government to have had the opportunity at the hearing to cross-examine Smith on the issue about which the testi-

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\*\* When asked if the statements about Wingate were false, Smith replied, "Yes, those were false because they were leading questions. It wasn't the way it was put to me" (H. Tr. 11). He never said, as Wingate claims (Br. 24), that he did not know Wingate was going to a narcotics transaction or that he made up the statements involving Wingate. In any event, Smith's post-arrest statements involving Wingate were redacted and were not submitted to the jury. Thus, even assuming *arguendo* that it was error to refuse to permit the introduction of Smith's suppression hearing testimony, the error was harmless beyond a reasonable doubt.

Judge Frankel was entirely correct when he observed that Smith's allegedly exculpatory suppression testimony would be of no practical importance to Wingate, since he had already fully confessed on the witness stand (Tr. 302-03). We submit that the application to offer that testimony was nothing more than a ploy to inject a claim of error into a record which established Wingate's guilt beyond any possible doubt (Tr. 303).

mony was offered at the trial. *Peterson v. United States*, 344 F.2d 419, 422-24 (5th Cir. 1965); *United States v. Franklin*, 235 F. Supp. 338 (D.D.C. 1964). Federal Rules of Evidence, Rule 804(b)(1); 5 Wigmore, *Evidence* § 1387, pp. 91-111 (Chadbourn ed. 1974). Smith was never cross-examined about Wingate's involvement in the crime at the hearing. The sole issue at the suppression hearing was the voluntariness of Smith's statement. Accordingly, the motive to cross-examine was completely different. It is insufficient to say, as Wingate does, that there was an opportunity to cross-examine Smith, because there was no opportunity to cross-examine Smith about the issue with respect to which the testimony was offered; cross-examination of Smith at the suppression hearing with respect to Wingate's participation certainly would not have been proper. While in some cases there may be sufficient identity of issues in a preliminary hearing, *California v. Green*, 399 U.S. 149 (1970), or suppression hearing *United States v. Curry*, 471 F.2d 419 (5th Cir.), *cert. denied*, 411 U.S. 967 (1973) and a trial to permit introduction of the hearing testimony at the trial, that was not the case here.

Finally, Smith's testimony that he was withdrawing from heroin at the time he made the statements introduced against him wholly lacked the "indicia of reliability" (Wingate Br. at 25) necessary for its admission. Smith's testimony was wholly inconsistent with the testimony of two DEA Agents and former Assistant United States Attorney Daniel H. Murphy, II (H. Tr. 20-22), with Smith's oral and written statements after his arrest (GX 3; Tr. 305-08) and with Smith's own sworn affidavit (GA 1a-2a). Judge Frankel found the testimony to be false beyond a reasonable doubt (H. Tr. 105). The Supreme Court has said that "[t]he basic purpose of a trial is the determination of truth. . ." *Tehan v. Shott*, 382 U.S. 406, 416 (1966). The exclusion of Smith's suppression testimony constituted a proper exercise of the District Court's affirmative responsibility and power to insure that this "basic purpose" was not thwarted in the present case.

## POINT V

### **The Prosecutor's Summation Was Neither Improper Nor Prejudicial.**

When the comments of the Assistant United States Attorney in summation are fully set forth and set in context, it is clear that there was no prejudicial misconduct. The portion of the summation in which Wingate \* claims the prosecutor used the prestige of his office to vouch for the truthfulness of Smith's statements (Br. at 30) can, when the entire statement is read, be seen to be merely an argument from the face of Smith's signed statement and an argument based on the circumstances under which the statement was given.

I think \*\* if you see the statement that it was given freely and voluntarily, that it was completely accurate and truthful. In fact, before he signed it the Assistant United States Attorney, at the time Mr. Murphy, said, "I show you this statement and if it is true and correct, sign it." \*\*\* He did sign it, indicating it was true and correct.

You heard that he flipped the pages before signing it to make sure what he said was completely accurate. You know very well a person after having been advised of his rights on four occasions does not make a statement, a signed statement, to two United States Attorneys, unless that statement is the truth (Tr. 375).

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\* Significantly, Smith makes no such claim.

\*\* The fact that the statement begins "I think" does not make it improper. *United States v. Hagen*, 505 F.2d 737, 740 (8th Cir. 1974).

\*\*\* The quoted language appears directly above Smith's signature (GX 3).



Wingate also complains of the following remarks of the Assistant United States Attorney in summation:

Now, I have only one last word. The United States Congress has passed the narcotics laws and appropriated funds so they may be enforced and you have heard of many federal agents and state agents that have done their jobs and collected evidence on the violation of the narcotics laws. You heard about the use of Kel transmitters, you have seen tape recordings that were used.

You have seen an undercover agent, a dedicated officer like Police Officer Heyward. You heard about the buy money that was advanced. These officers have gone out very carefully and done their job to enforce the narcotics laws and to protect you against the narcotics traffic.

What remains is up to you. All of these narcotics laws mean absolutely nothing if this man can go free.

Mr. Curley [Counsel for Wingate]: Objection.

The Court: What is the ground?

Mr. Curley: Improper summation.

The Court: I think the jury can understand that this is kind of rhetorical. The jury has heard reference to baseball, and Catch-22 and this is perhaps unnecessary, the reference to law enforcement efforts. You will understand, however, it is merely argument and your focus must be on the evidence. Have you concluded, Mr. Fortuin?

Mr. Fortuin [the Assistant United States Attorney]: I will in one second, your Honor.

In the beginning, I asked you to do one thing and that is decide the case on the evidence. I ask you to do that now.



These remarks, when placed, as they must be, in the context of the trial, *United States v. Bivona*, 487 F.2d 443, 447 (2d Cir. 1973) were neither improper nor prejudicial. Wingate's counsel told the jury, wholly without any factual support in the record, with respect to the Government's witness Tyre, "And he met an United States Attorney, a colleague of Mr. Fortuin in Florida and they wanted him to lie" (Tr. 350). He continued by arguing that Tyre, who had been in jail as a material witness for eleven weeks, was in jail because he refused to lie for the Government:

He [Tyre] told him [the Assistant United States Attorney in Florida] he had been on probation for dealing in drugs before, he got caught with 200 grams and they wanted him to lie and he said no, "I have had enough."

Amazing. Was he as he first indicated in jail for over 11 weeks because of this disagreement with these government employees, the representatives of the United States Government in court because they asked him to lie? (Tr. 350.)

He further argued that, "it is a guy named Wingate that the Government wants now" (Tr. 357). He referred to the Assistant United States Attorney's admonition in his opening to weigh Tyre's testimony with "great care and caution" as a "gross understatement" and continued "but unfortunately it fits so well into the miscarriage of justice that is taking place during this trial" (Tr. 359). In other places, he referred to "the innocence" and "innocent ramblings of my client" (referring to Wingate's tape-recorded narcotics negotiations with Tyre) (Tr. 362).

In light of these remarks, which unmistakably accused the Government and its agents of jailing Tyre in order to suborn perjury, the remarks of the Assistant United States Attorney were entirely appropriate and remarkably

subdued rebuttal. *United States v. Larn*, 355 U.S. 339, 359 n.15 (1958); *United States v. Tramunti*, *supra*, slip op. 2107 at 2164-66; *United States v. DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.) (concurring opinion of Mansfield, *J.*), *cert. denied*, 416 U.S. 956 (1974); *United States v. Santana*, 485 F.2d 365, 370 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States v. LaSorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States v. Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

In *United States v. Stead*, 422 F.2d 183, 184 (8th Cir.), *cert. denied*, 397 U.S. 1180 (1970) the prosecutor in summation told the jury:

Ladies and gentlemen, I urge you, based upon the evidence in this case, for the good of the community that you represent, rid ourselves of these burglars, sneak thieves in the night \* \* \* and find him guilty as charged.

The Court of Appeals held that these remarks were within permissible bounds:

The Government's argument, however, was obviously based upon the evidence presented at trial, which evidence was ample to support a finding that Stead was guilty and was a burglar. The Government merely went on to stress to the jury its duty, and the importance of incarcerating a man a jury believes to be guilty of crimes against the community, rather than allowing feelings of mercy to result in an innocent verdict for a guilty man. We believe that even without the cautionary admonition by the Court to the jury this argument was within permissible bounds. (422 F.2d at 184.)

*See also, Di Carlo v. United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1924).

Even assuming that the remark "All of these narcotics laws mean absolutely nothing if this man can go free" was ill-advised, it is undisputably clear that in this case "a reversal would be an immoderate penalty." *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939). Any possible prejudice which might have accrued from this remark was largely countered by the steps taken: objection was promptly made and the jury was immediately instructed that the remarks was "kind of rhetorical" and "perhaps unnecessary" and that their "focus must be on the evidence." See *Gaither v. United States*, 413 F.2d 1016, 1080 (D.C. Cir. 1969).

In light of all the circumstances, the remark, even assuming that it was unwarranted, could not have had and did not have any impact on the jury. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-43 (1940); *United States v. Tortora*, 464 F.2d 1202, 1207 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *United States v. Callanan*, 450 F.2d 145, 150-52 (4th Cir. 1971); *United States v. Elmore*, 423 F.2d 775, 780-81 (4th Cir.), *cert. denied*, 400 U.S. 825 (1970); *United States v. Medelin*, 353 F.2d 789, 795-796 (6th Cir. 1965), *cert. denied*, 384 U.S. 973 (1966); *Marks v. United States*, 260 F.2d 377, 383 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

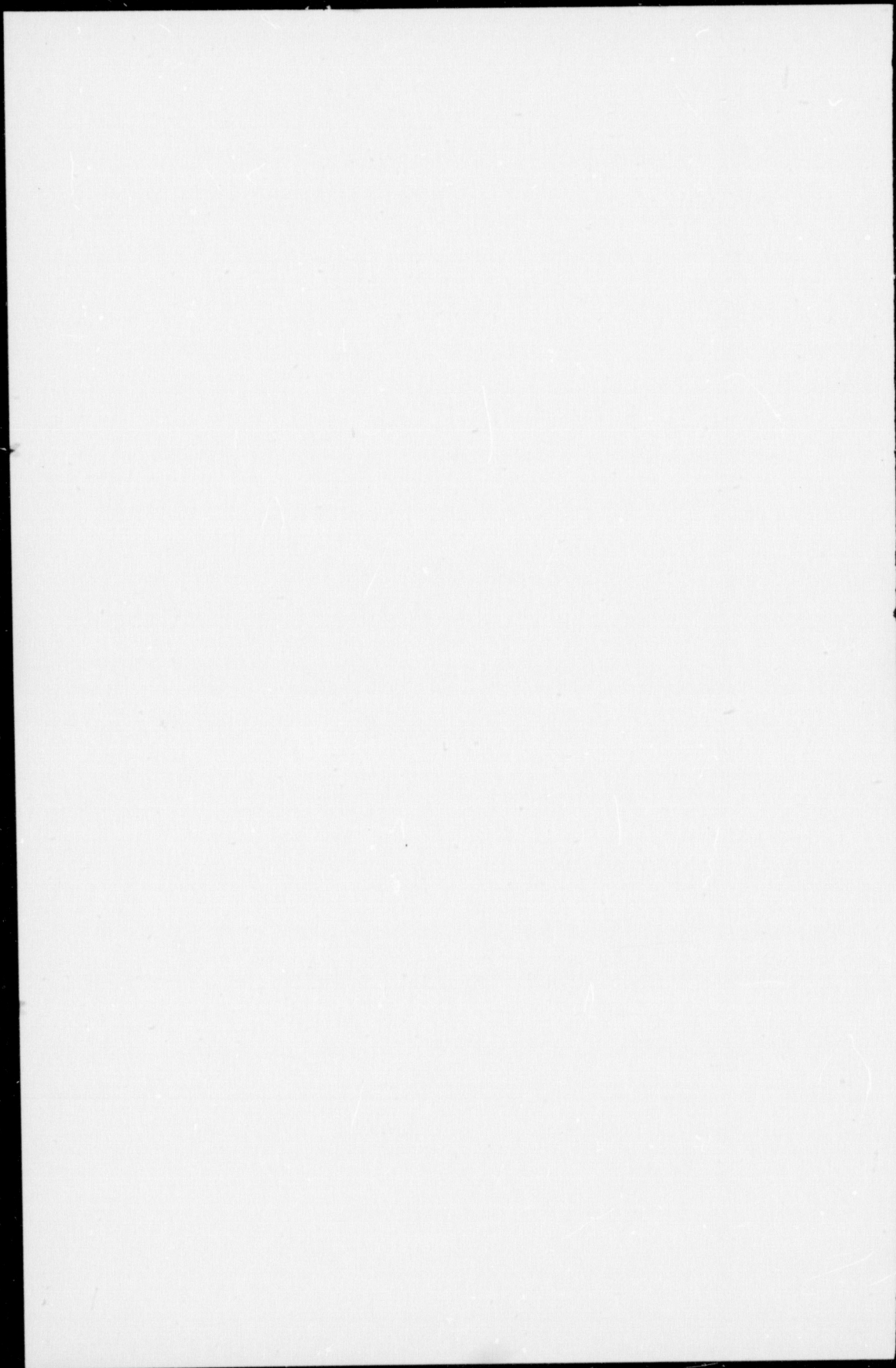
PAUL J. CURRAN,

*United States Attorney for the  
Southern District of New York.  
Attorney for the United States  
of America.*

THOMAS M. FORTUIN,

LAWRENCE S. FELD,

*Assistant United States Attorneys,  
Of Counsel.*





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**APPENDIX**

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**Affidavit of Kenneth Luke Smith in Support of Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

—v.—

FRANK WINGATE and KENNETH LUKE SMITH,  
*Defendants.*

---

State of New York,  
County of New York, ss.:

KENNETH LUKE SMITH, being duly sworn, deposes and says:

1. I am the defendant in the within action, and I make this affidavit in support of the motion now pending before this court to suppress a statement made by me to an Assistant United States Attorney on July 2, 1974.

2. At the time that I made this statement, I had been in custody for approximately ten hours.

3. Before being brought to the courthouse, and while still at West Street, I asked for medical attention, but received none. I was told that upon my return from court I would get whatever medical attention was necessary.

4. In the courthouse I was asked questions by a man who I now know was an Assistant United States Attorney. At the time, I was informed that if I made a statement I would be placed in a program known as TASK, (a drug rehabilitation program) and that my case would be dis-

*Affidavit of Kenneth Luke Smith in Support of Motion*

missed. I was led to believe that after making a statement I would not have to return to court.

5. At the time of my arrest, I was a user of cocaine, and when I was brought to the courthouse, I was ill. I did not fully understand what was being read to me. To the best of my recollection, I was not asked whether I wanted to waive my right to remain silent. I remember only being told that if I made a statement I would not have to return to court and that my case would be dismissed.

6. Had I understood at that time that the statement would be used against me, I would not have made any statement.

7. I make this affidavit pursuant to the court's request made at a conference held in chambers on November 13, 1974.

WHEREFORE, your deponent respectfully requests that the motion for a hearing on the voluntariness of his statement be granted.

/s/ KENNETH LUKE SMITH

KENNETH LUKE SMITH

Sworn to before me this 19  
day of November 1974.

/s/ JOYCE KRUTICK BARLOW

JOYCE KRUTICK BARLOW  
Notary Public, State of New York  
No. 24-2211745  
Qualified in Kings County  
Commission Expires March 30, 1975

**Government's Bill of Particulars**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 860 (MEF)

---

UNITED STATES OF AMERICA,

—v.—

FRANK WINGATE and KENNETH LUKE SMITH,

*Defendants.*

---

The United States as and for its Bill of Particulars alleges as follows:

1. With respect to statements made by the defendant Smith: Smith was immediately advised of his constitutional rights on July 2, 1974, after his arrest and again later at DEA headquarters. At that time he made oral statements in substance and effect the same as those given to Assistant United States Attorney Daniel Murphy prior to his arraignment the following day. Smith gave Mr. Murphy a signed statement, which has been produced. Smith was re-arrested on August 22, 1974, immediately advised of his rights and later that day interviewed by Assistant United States Attorney Harry Batchelder. During that interview he made oral admissions in substance and effect the same as the signed statement he gave to Mr. Murphy.

2. The Government's evidence will show that Smith was to be the source of supply of the narcotics to be delivered on July 1-2, 1974.

*Government's Bill of Particulars*

3. COUNT ONE

Overt Act 1—occurred between the undercover agent at a Holiday Inn, New York, N.Y. and Frank Wingate at 1416 Bristow Avenue, Bronx, New York.

Overt Act 2—phone calls were made inside the Crotona Bar between 4:00 and 6:00 P.M.

Overt Act 3—occurred at approximately 6:30 P.M. outside of the Crotona Bar.

Overt Act 4—occurred at approximately 6:30 P.M. inside the Crotona Bar.

Overt Act 5—occurred at approximately 6:30 P.M.

Overt Act 6—occurred at approximately 10:30 P.M.

Overt Act 7—occurred at approximately 1:30 A.M. on what was actually July 2, 1974.

COUNT TWO

Occurred in the vicinity of the Crotona Bar, between the hours of 6:30 P.M. and 8:00 P.M.

COUNT THREE

Occurred in the vicinity of the American Airlines Office at the main arrival/departure building at LaGuardia Airport between the hours of 2:00 A.M. and 3:00 A.M. on what was actually July 2, 1974.



*Government's Bill of Particulars*

4. The co-conspirators currently known to the Government are as follows:

- a. Myrell Tyrell  
Leon County Jail  
Tallahassee, Florida
- b. Bernice Jones  
400 West 148th Street, Apt. A  
New York, New York 10031
- c. Jacob F. Edwards  
572 East 166th Street  
Bronx, New York
- d. John Doe, a/k/a "Bumpsie"
- e. Chuck Dennis  
1562 Vyse Avenue  
Bronx, New York

All were known to the Government at the time of the filing of the indictment.

5. The only electronic surveillance used in connection with case were (1) tape recordings between Frank Wingate and agents of the Government on the informant, and (2) a so-called Kel transmitter worn by the undercover agent with his consent on June 14, 1974. Copies of the tape-recordings have been produced. With respect to the Kel transmitter, the recording unit was too far from the transmitter to make a recording. Other agents, however, utilized a monitoring device, which was not equipped with a recording device, and they will testify to what they overheard.

*Government's Bill of Particulars*

6. There will be no evidence of actual physical possession of cocaine or heroin by either defendant.

Respectfully submitted,

PAUL J. CURRAN  
United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America

By: .....  
THOMAS M. FORTUIN  
Assistant United States Attorney  
Office and Post Office Address:  
United States Courthouse  
New York, New York 10007  
Telephone: (212) 791-0932

**Letter From Paul J. Curran, United States Attorney,  
to The Honorable Marvin E. Frankel, District Judge**

TMF:nc

74-2142

n-634

December 24, 1974

The Honorable Marvin E. Frankel  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: United States of America v. Wingate, et al.  
Indictment 74 Cr. 860 (MEF)

Dear Judge Frankel:

At trial of the above-captioned case, the Government intends to introduce against the defendant Smith certain written and/or oral statements made by him after his arrest. The Court of Appeals has held that any potential problems that might arise under *Bruton v. United States*, 391 U.S. 123 (1968), should be resolved prior to trial, *United States v. Glover*, Dkt. No. 74-1739, Slip Op. 33 at 45 (2d Cir., October 4, 1974). I am, therefore, enclosing a copy of the written statement of Smith which the Government intends to offer. I have circled in red the portion which inculpates the co-defendant Frank Wingate and which I propose to delete for *Bruton* purposes in submitting the statement to the jury. Of course, any witnesses to oral statements made by Mr. Smith will be instructed to avoid mention of anything which inculpates Mr. Wingate.

3a

*Letter From Paul J. Curran, United States Attorney*

I believe that this procedure avoids any possible problem under *Bruton*.

Respectfully,

PAUL J. CURRAN  
United States Attorney

By: .....  
THOMAS M. FORTUIN  
Assistant United States Attorney  
(212) 791-0932

TMF:mc

The Honorable Marvin E. Frankel  
December 24, 1974

BY HAND

cc: John Curley, Esq.  
Legal Aid Society  
United States Courthouse  
Foley Square  
New York, New York 10007

Joyce Barlow, Esq.  
233 Broadway  
New York, New York 10007



**Transcript of Government's Exhibit 1**

Telephone Call 6/6/74

SGI—4—0071 to Frank Wingate

W Hello

INF Hello Frank

W Yeah

INF Marell

W Whats happening

INF Not too much, whats happening with you?

W Well everything is all right

INF Listen, err—, I ran out on you last time without accomplishing anything because things got fucked up. I'm down here in Florida.

W Oh

INF I'm down here in Florida now and a friend of mine down here got some money he wants to spend.

W Yeah

INF Oh—can you do an 1/8.

W Probably so.

INF In the next day or so

W When you—when you going to get here.

INF Oh—anytime you can do it. I'm mean he's here with the money and everything right now.

W What kind of money he got?

INF Oh—were thinking about an 1/8 to start with—and maybe a week later about twice that.

W Oh

INF Can you handle that

W Yea I can do it

INF You can do that

W Yea when you going to get here

INF Just a second let me ask him—Oh Frank

W Yea

INF Let me see this is what Thursday

W Yea

INF Probably Monday or Tuesday

*Transcript of Government's Exhibit 1*

W Oh—Monday or Tuesday  
INF O ha His working and shit this week and he wants to come on up—you know—but he's got—I mean dudes got the cash and shit you know  
W Yes I'd only I'd only do that along with you anyway  
INF I know—yea—I know  
W Yea  
INF I know that—but err you know its all right and everything. I've know the dude and everything for a long time, He's—He's good people  
W Yea—but I don't wanna—I don't wanna make that—you know—that brake like that  
INF Oh yea I know what your talking about.  
W Yea  
INF Well listen I'll tell you what—just before—you go ahead—I mean this is for sure. There ain't no—I mean—I ain't going to tell you to do something and then not do it—err  
W The same way as before or the—all the way  
INF All the way  
W All right  
INF I mean for sure—you know—look go ahead and talk you know and get everything set up and err—just err—I'll call you back and err—oh yea about how much would an 1/8  
W I'll have to check it out baby  
INF Can you give me an estimate  
W Oh  
INF Can you give me—sort of a price  
W Oh  
INF Close  
W Oh—you talking about well listen now what I'm saying  
INF Okay like oh—I tell you what you  
W Thats running up there now  
INF Yea I know

*Transcript of Government's Exhibit 1*

- W You know that right
- INF Yea but its—what kind of quality are we gonna get
- W Hey—maybe 5 or 6
- INF Yea
- W Yea
- INF Thats about the best. What if we got more the next time, can you get quality better.
- W I don't know baby
- INF Well would you check on that for me
- W You know how the situation is
- INF Yea I do. I know how the situation is and everything but why—but I know you know a bunch of people too—so just check—just check with everybody you know and see who's got the best shit.
- W Yea well I do the best I can for you
- INF Okay—well I'll tell you what I'll do, I'll call you back about 2 days before were coming and give you a positive date and everything.
- W Yea—but see now what—hey why don't you leave me a number or something
- INF Okay
- W Well listen when you call me back leave me—err well listen you call me back
- INF When
- W Because like err
- INF When you want me call you back
- W Now dig this here, now see the best thing if you can't reach me in the morning, if you don't reach me here by err by about 12 or 1 o'clock
- INF Oh err
- W You know, then you, you'd have to call back, you know about after 4, my mother here
- INF Yea right—yea thats what I did—yesterday. I just talked to her—you know—had her leave a message for you. But I'll do that too and if your not there I'll leave a number where you can get in touch with me.

*Transcript of Government's Exhibit 1*

- W Err either that just leave—normanlly she be able to get in touch with me
- INF Will you
- W And then just give a time when you going to call back, you know.
- INF Okay—well your not gonna—you be probably at Eldorado or Kennys or at your
- W Well I don't know cause you know I've been doing some running you know
- INF Oh you have
- W Yea
- INF Ok—well thats good news, you doing all right for yourself?
- W Ah—not so (inaudible) you know
- INF About so so
- W No just hanging
- INF Ok—well I tell you what, Oh, go ahead and check in to what I was telling you and talk to your people, you know its for sure, and I call you about 2 days before coming up
- W Yea but (inaudible) err—like the last time
- INF I know
- W You know that—no I'm talking about err—you jamed me that
- INF I know
- W So
- INF I know, yea, I know
- W But err—that estimate thing I'm talking about err—that was running man back here was last year, yea, you know it was running up there in the 6's you know 6 or 7 you know
- INF —Goddam Frank
- W —(inaudible)—Hey well listen. I'm, hey look here I'm—I'm just saying
- INF Yea I know—I know—I'm just saying—wow.
- W I'm telling you man



*Transcript of Government's Exhibit 1*

INF Yea—ok will we'll see what we can do  
W You know  
INF You know—well get it together and I'll give you a call back  
W You don't give me any idea what kind of money there is—you know there is—  
INF Well we can get—you know like the people got plenty bank, there be no problem at all with the money. I mean thats  
W Yea  
INF They got lots  
W Yea  
INF Err—that ain't going to be the problem, the problem you know as long as we can pull the think off smooth and we can get good quality shit—you know there'll buy it.  
W Yea  
INF And buy a lot  
W All right  
INF Err—OK  
W All right  
INF OK will I'll give you a call probably about Sunday or some time around then.  
W OK  
INF And make sure you have everything set up and then we'll come on up  
W Right  
INF OK have a good day Frank  
W OK  
INF OK talk to you later, bye bye  
W bye

**Transcript of Government's Exhibit 2**

Call # 10

W Hello.

INF Hello, dude.

W Hey baby.

I Yea what you doing?

W Yea I'm awake.

I You awake?

W Yea.

I Try to get hold of the people?

W No—I tell you I gotta go up there at 2:30.

I OK. Well listen, did you —, can you think we can do this today?

W Yea I think so.

I Ok good — cause the people really want to — you know there — their sittin around wondering what in the fuck I'm doing. I'm telling them I can do it quick and shit and their saying "Well . . ."

W Well shit they aint got to realize . . .

I I know that.

W You know?

I Yea I know — I told them — they fucked up last night — you know when I didn't get up there on time and shit. So — OK what time do you want me to get back in touch with you.

W Well I'll get em touch with you as soon as I rap with him.

I Err

W So I — you be hearing from me about 3 o'clock.

I About — about 3

W Yea

I OK — Ill lay there and wait for you till then.

W Okay then

I Okay—Will talk to you later

W Right

I Bye bye

*Transcript of Government's Exhibit 2*

Call # 11

INF Hello?

W Hey.

I Hey dude -- what's going on?

W You.

I Huh.

W You.

I Yea I'm glad to hear it

W Listen err I got just (inaudible) my man I was looking for

I Oh huh

W Right Now -- the one thing was that good on the 7 right.

I One thing what

W a 7

I a 7

W Yea.

I It will stand a 7

W Yea -- cause you know just listen

I Oh Huh

W But that's running about 62—you know

I Ooh

W That's what I'm saying

I Ooh -- well you -- can you get me a piece of it to see & I'll

W Well I

I and I

W Will I

I So OK this what's happening -- Err -- they want quality **right**

W Yea

I And they will pay the price for it but like they're not -- they're not gonna go get that much more money and in -- and in -- he's not gonna get up that much more money without knowing exactly what it is.

*Transcript of Government's Exhibit 2*

W Yea — well that's what I say. Alright so I gotta get back to him err by cause see I just ran into him. He gonna go home now. I gotta call him about 4:30-5 o'clock. But I'm at this other place where I was supposed to be at 2:30 you know

I Oh huh

W And I wait for that boy to come here. He came by but he'd stayed a minute, so err I waiting for him to come back & I find out the other thing on that.

I Oh huh

W You know that I mean

I Yea

W As soon as I find that out then we rap on the thing & get it together. See what's going to happen.

I Yea that sounds good though — you know — I like the quality.

W Yeah.

I I like the sound of that now — err — You sure of it huh.

W Yea — Well I ask him is it definite — he says yea they got it, you know, but then you know like that's the way he said. I said what's it running thing. He say well listen it runs about 62. He says when I call him back he will let me know exactly what the fuck is going down.

I OK

W Call him back you know, so I got to reach him err and then I try to reach him.

I about — OK.

W Well I'm gonna call him between 4:30 & 5.

I OK — Why don't — Why don't you call him about err between 5:30 & 6 o'clock.

W OK

I Is that a bet?

W That's a bet.

I OK now check into that thing what — with the 7 — now . . .



*Transcript of Government's Exhibit 2*

W Yea.

I You know if it, if it

W That's the one I'm talking about (inaudible)

I If its for real & that good we'll pay more.

W All right.

I You think

W Right

I OK And check into the other thing too

W OK

I Just make -- get both things set up. So we do -- we can do either one of them.

W All right.

I And I'll tell you then.

W Well listen -- on that -- on this here first thing I'm talking about. I might be calling you back in a little while.

I In a little while

W Yea.

I How long

W Hey within the hour

I I'll be here

W All right -- well lay there -- you know -- I'll call you back one way or the other.

I OK

W OK

I **Within the hour**

W Just in an hour

I OK

W All right

I bye bye

W bye

Call #12

INF Hello.

W Hey man.

I Hey.

*Transcript of Government's Exhibit 2*

W Jesus Christ.

I Well you called this afternoon & I was in there talking a shit, on somethin, right at 3:30.

W Yea, but I called back about 5:30, I've been calling back about 4 or 5 times and . . .

I Oh, I'm sorry — I — I was down eating and talking to some people & shit. I've been here in the hotel the whole time. I just haven't been in the room the whole time. So is everything set up?

W Hey — all he gotta do now is call me back & give me the time.

I Ok — err —

W You know — so I expect to hear from him, Hey (inaudible) I'm at the house now.

I You're at the house now?

W Yea — he called me before & I was reachin, you know, you see what happened his car messed up on him.

I Oh huh.

W And I — cause I ran into him when I was going uptown.

I Yea.

W And his car had jammed up and they hadn't finished his car yet

I Oh huh

W So you just waiting for him you know.

I So that's all you're waiting on?

W Yea.

I OK I tell you what, you hang there & I call you within the half hour.

W Yea (inaudible)

I OK I mean

W Hey

I for sure

W Yea & Just make sure when he get ready, when I tell you to come on, just bring that thing with you now, you know

*Transcript of Government's Exhibit 2*

I OK — now listen you, did you get the expensive thing or the other thing.

W The expensive.

I Humm.

W You know?

I Yea.

W You know, that's what you said he worked on, right?

I Yea

W Yea, on the other thing the joker jiving around — you know Hey — I lay up there, and laid up there, He didn't show back, you know

I Oh Ha

W So just said — man I'm not going lay up there no more and I left and came on back down to the house

I Oh huh

W You know

Okay — Okay well let me get off the phone. Let me get in touch with the dude and I'll — and I'll call you back within the 1/2 hour.

W Yea all right.

I At your house

W All right

I Okay

W All right

I Okay, Okay for sure now.

I Okay I'll talk to you shortly.

W right

I Bye bye

W Bye.

13 Conversation Between SGI—4—0071 & Unknown

*Transcript of Government's Exhibit 2*

Call # 14

INF Frank

W Yea

INF It's Marell—listen—in—yea—we're ready to do it, only thing is we—we, we just figured out we only got but 52 hundred (\$5,200.00) dollars.

W Oh, wow

I I know, I wanted to tell you before we did it so we wouldn't get down there and then tell you when we're down there and shit. You know we didn't expect to have to — you know an 1/8 to cost that much.

W Yeah.

I You know—we'd . . .

Q That's what I told you that (inaudible)

I Yes, I know. I know, yea you told me that today, you know, but—but when we came up here we expected to spend, you know, 5—, 52—, 55, something like that. You know I we just haven't got 62 hundred. But err we can do one of a few things. We can buy part of the package tonight, we can err—we can get a sample of it tonight. Wait until the morning, I and I think, I think I can get another grand up tomorrow morning. Err — it depends upon what you want to do and what your man wants to do. Would you like us to buy 1/2 of it tonight and then you hold the package and us pick up the other half tomorrow? You know, anything like that.

W Yes—but see the thing about it—err—I might not even be able to get it if I ain't got—I know I doubt if I be able to get it if I ain't got all the cash.

I Yea.

W You know.

I Well—would he, would he err—would he let you ride for—for part of it until the morning.

W No—that's what I'm saying man, you know. I doubt it. I know it.



*Transcript of Government's Exhibit 2*

- I You doubt it.
- W Yea, I doubt that very much, man.
- I Err, would he break the package up.
- W I don't know. What—what you mean, you want it half way.
- I Yea—something like that.
- W Oh
- I You know, like I hate to do this. But I just didn't, you know, we just didn't have that much money. We're—we're—a few, you know, we're about 800 bucks (\$800.00) short or something.
- W Yes
- I So what do you think?
- W Err—let me see.
- I You give me a suggestion—you know I wanted to tell you before we got in meeting and everything, —and got your man down there and all that—so you didn't think I was trying to pull some funny shit or something.
- W Yea—now what you want—you want err you wanted it, you wanted err, a piece of it or err—
- I Yea—well, half if we could do that, if not we could just get a sample tonight and do the rest of the thing in the morning. Do the whole thing tomorrow— Like I said I didn't know, you know, I didn't know we were that short or we could have gone out looking today. You know, but it's, you know he's counting up his money and shit and comes out—doesn't have quite that much. You know we spent a hell of a lot here since we've been here you know for 3 days.
- W Yea but see you
- I Something (inaudible)
- W You'd suppose to call me also.
- I Yea, I know

*Transcript of Government's Exhibit 2*

- W     Yea
- I     I know—I know
- W     Yeah
- I     So what do you think, what—what is sound like  
best thing for you to do?
- W     Err—where you at now?
- I     I'm at the hotel.
- W     Well let me, let me—let me—(inaudible)—erm,  
erm—let him get in touch with me and then  
I'll see what's happening and I'll get back to you.
- I     How long?
- W     I—well I don't know cause he—he done called back  
you know and everything but you know like err I  
told him, I said, I had to wait, you know, to get  
in touch, you know.
- I     Well we got 52 hundred—that's what we've got.  
You know, if it's, if he's willing to wait until in  
the morning, you know, we can get the other grand.  
If not we get 1/2 of it tonight. Just to show him  
we're going to do it or something.
- W     But you can definitely have it tomorrow?
- I     Yea—definitely have it tomorrow. No question about  
it. I've already talked—I've already made some  
phone calls and shit, but the people can't get it  
till the banks open. You know I'm just going to  
borrow from some—from some friends of mine up  
here. You know, but they can't get at it 'till the  
banks are open.
- W     And this is sure enough, sure enough?
- I     This is sure enough, sure enough. We're positive,  
absolute fact, no question about it.
- W     We'll listen here. When he calls me back—I call  
you—cause evidently he ain't finished, they ain't  
finished with his car yet.
- I     Oh, huh

*Transcript of Government's Exhibit 2*

- W Evidently, you know, I mean, you know, cause he got, err—you know like he said, like I said he called me, but they hadn't finished anyway.
- I Oh, huh
- W So this way here, when they finish up. There'll go on, you know, cause all he gotta do just give me the time thing now—you know—cause I told him; man I said I gotta know what the hells happening, you know—
- I Yea right—right—I know you don't.
- W So why—you just got to lay that on the call though—you wanna come by here or what?
- I Come by your crib?
- W Yea
- I Okay—I'll do that.
- W Well then (inaudible).
- I And we'll talk then.
- W Well what you can do then, you know, hey cause we— what we'll do is, we'll just lay right here.
- I And talk to him when he comes
- W No— what you just do is bring the thing, what you got right now, and then what ever — come down you just take the rest of it back.
- I No wait a minute, what was that again?
- W You got 52 right?
- I Yea
- W Alright, if I can work something out, then there won't be no delay or nothing, you just have the money with you and when you come and we just lay here for my phone call.
- I Oh him — we'll see this dude don't want to come down into — into — into — Harlem and shit, you know..
- W I'm not in Harlem.
- I Where you at?
- W I'm in the Bronx.

*Transcript of Government's Exhibit 2*

- I Well — you at your momma's place?
- W Yea.
- I Right — well that's what I mean, he don't want to come down in there. He's afraid of getting ripped off and shit.
- W Why?
- I I don't know — huh — you know, he want's — well I tell you — how about, how about . .
- W What he don't trust you?
- I Well, he trusts me but err, his you know, he had some trouble up here once before. You know and he lost some money.
- W Well shit — you know damn well I ain't (inaudible) given around here somebody going to be coming to my house on no rip off.
- I Oh, I know that — well can he —err—Okay I'll see what we can do, you know, I'll — how — well what we wanted to do you know, is meet someplace, you know, where there's a lot of people and shit so nobody can know what is going on.
- W Well listen now hey
- I You know, like you and I did before in a bar & shit
- W Don't worry I'll have it — I'll have it, I'll take care of that part of it and everything will be all right. Ain't nobody gonna know nothin' anyway.
- I At your — at your momma's
- W No, what I mean ain't gonna go, ain't going to come off like that, you know, but you can meet me here and then err — we just hit another bar, you know,
- I Okay—well what about . .
- W OR — OK — you wanna lay 'till he call me, you just lay there.
- I Well I tell you what — I tell you what— how does the West End Bar on Broadway sound to you. It's right down
- W No, I'm not — I'm not going to do it down there.



*Transcript of Government's Exhibit 2*

I Okay—that's  
W You know  
I Well—you tell me something  
W Well just— you just let him call me back and you just lay there for me.

(TAPE RUNS OUT ON SIDE #1)

Call # 15

I=Informant                      W=Wingate                      H=P.O. Heyward

W Hello  
I Hello  
W Yo  
I Yea listen—huh—you talk to your man yet.  
W No.  
I You hadn't had a chance to get hold of him—Huh?  
W No.  
I Well I made a few phone calls and got hold of a few people & I've got something working—to get the rest of that shit together—Err can you positive we we can do it tomorrow then—huh.  
W (inaudible)  
I You havn't talked to him anymore tonight, so you don't know, Huh.  
W You know what I mean?  
I Okay—well—hows about 3 O'clock tomorrow afternoon sound to you?  
W Well see you all really fucking my time around.  
I Huh.  
W Yea now you tying my time up (inaudible)  
I Well what time—tell  
W No what I'm saying like this here now if I go on and—and like of he come on through the night then Hey listen  
I You want—you want us to—you want do you want me to go ahead you know and get something tonight.

*Transcript of Government's Exhibit 2*

- W Get that money cause I mean listen because (inaudible)
- I You want him to see some money (inaudible) something is going to happen and stuff.
- W Hey cause this way here—I hey if—it—I want him to see some money weather if you turn it down, if you did if you did just say wait till tomorrow, I want him to see some money so this way man I no be like the liar all the time, you know what I mean.
- I Yea right he'd
- W You know
- I You just want—you just want him to see some money.
- W Let him see some.
- I And let us make a small purchase or something just—
- W Hey listen.
- I Just to err
- W I don't care if he make—he make the small purchase or whatever it is man just but—Hey—look here.
- I Just so the man can see something.
- W I gotta have something, man, to see something, cause God Dam—you know, this don't make no sense, I'm talking and talking, you know and then and then nothings coming off, you know, this is—this is
- I Yea
- W Keep on jaming, this is going to jam me up for—in case I do get you know, get a shot at something (inaudible).
- I Yes I know—I agree with that
- W You know what I mean
- I Okay well
- W So listen when—thats what I say—why don't you just go on hook up what you can.
- I Oh hum

*Transcript of Government's Exhibit 2*

W And then just lay—you know—be able to err—where I can reach you when he—when he get in touch with me.

I Oh hum.

W You understand?

I Well what I was thinking is—, you know, tomorrow we—we can buy the whole thing, if, if you want—If you want to do something like see some money or something err—or if you want us to get a small piece of it tonight, you know, a sample or something we can do something like that.

W Oh.

I Just to—just to show him you know that were going to do it, cause.

W You gonna be there where I can reach you

I Huh

W You gonna be there at that—at the place.

I Yea

W Alright then—just let me get back to you then, you know, but go on get—get—get up—what you know—get that money, you know, understand but hey even though we just didn't make that one thing and you know whatever it is let rap with him, you know then I know then what is happening.

I OK—Huh.

W You know what I mean but just be ready when I you know when I say hey—cause if necessary I'd just tell hey Id just take a piece of it, you understand

I Well listen do you wanna talk to the dude thats—that's here with me.

W Yea—put him on.

I Okay—just a second.

P.O., Heyward Hello

W Hey baby

H Hou you doing?

*Transcript of Government's Exhibit 2*

- W Listen my name is Frank
- H Yea.
- W I guess you know by now.
- H Right
- W Listen, what I'm saying like this here, now hey—  
now you say that you don't have it all—right.
- H No.
- W Dig what I saying, so now what I'm saying is this  
Hey—I know the man ain't gonna come down, you  
dig what I'm saying.
- H Not off the 62.
- W No—he ain't he aint gonna work that. I'm almost  
sure for see—I aint hey—I can't—I can't just go  
out there and you know and—and go out on the  
limb like that.
- H Yea, I don't expect you to.
- W You dig what I'm saying.
- H Right.
- W Now—err—the best I can do is hey—rap with him  
& see what happens. You dig what I'm saying. And  
then err—whatever—err—arrangements to be made.
- H Well let me—let me ask you this.
- W Just—yea
- H You mean there's a possibility like he'll let me go  
for the money—the rest of it.
- W No—I—I doubt that—that I mean listen—hey—  
what I'm gonna have to do—hey—I'll just have to  
try and rap the best I can, get you the most I can,  
you know—for what I can,
- H Well are you going—see that's the thing. I—well  
he wait until tomorrow. It will be a different thing  
tomorrow.
- W Yea—but dig it—I had told him a different thing  
tonight.
- H Yea but err—he just telling me, you know, 62. I  
didn't expect to spend that much.



*Transcript of Government's Exhibit 2*

- W Yea, well I telled him that he's supposed to call me before he ever came in. I gave him a rough, you know, a roughly thing, you know, then because
- H But he told me 5
- W Who
- H The kid.
- W Yea—but see now things are rough up here too, man.
- H Yea, well I can understand that man but that's a 12 hundred dollar jump.
- W Well, listen hey—you have the perogative to say yes or no.
- H Right—that's why I'm trying to talk to you about tomorrow—to see if its a definite thing.
- W Yea
- H Tomorrow—you know—there won't be no problem with the price or nothing. But you gotta give me a chance to do it.
- W Alright—listen here—let me—when he as soon as he get in touch with me I call you back. I'll get in touch with you. All right.
- H All right.
- W I'll go—I'll give him a ring down there and then I'll—I'll see what I do—I'll look it up for tomorrow or what not.
- H Alright—well how long you talking about.
- W Hey listen—I got to wait on him cause I told him (Inaudible)
- H Oh I thought you said you were gonna give him a ring.
- W Well, now, I called him just a few minutes ago—just like I told Marell—his car is jammed.
- H Huh.
- W You know—so err—he should be getting in soon, and he's gonna get back to me cause he's supposed to give me the exact time, you know—and everything then, you know.

*Transcript of Government's Exhibit 2*

H alright—but did, you know, cause I don't wanna  
I don't wanna brake up something & go back with  
W No—well I don't blame you  
H less then I wanted to  
W I don't blame you, you know  
H Yea so it will—its a deffenate thing for tomorrow  
like tomorrow afternoon the man told me he get  
the money up  
W Hum  
H and err—you know—pass it on down—I'll be ready  
about 2 or 2. The latest—thats a defenate thing.  
And err—you know  
W Alright—it can't be no sooner—well listen—I tell  
you what I'll be rappen with you in the morning  
or later on tonight any ways.  
H alright—what you gonna call in the morning on  
tonight  
W Yea  
H let me know man cause you know  
W Huh  
H What you gonna call back tonight or tomorrow  
morning  
W Yea I'll call back tonight—well—I'll call back when  
I hear from him any way, then I let you know  
something  
H OKay  
W you know  
H alright  
W and then we go from there  
H alright now let me ask you another question where  
is it you want me come at to.  
W Hey, well it be in the Bronx, you know  
H the Bronx  
W Yea  
H neighborhood alright through  
W Hey baby listen—there ain't nothing wrong

*Transcript of Government's Exhibit 2*

H All right  
W you know—square bedrooms—everything will be everything.  
H Oay  
W (inaudible) may man well vouch for that everything you know  
H Hum  
W You know, cause if there was going to be something like that I would not even, you know, home nobody even know know where I'm—where I'm living, You know  
H Okay  
W Yea—see  
H Allright then—get back to him tonight then—let me know  
W Yea—okay—then  
H All right  
W right  
H Okay  
W Chow

Call #16

Wingate Hello

Informant Hello

W Hey

I What's going on

W (inaudible) what time is it

I Well got everything together

W and what time is it

I Err right now

W Yea

I It's one o'clock—5 minutes after one

W It's 5 minutes after one already

I Oh huh—you just got up

W Oh man

*Transcript of Government's Exhibit 2*

I Ha Ha ha  
W Dam  
I You lazy fucker—I thought I was lazy  
W Holy shit  
I HaHa you worse off than Dam  
W Boy this is the first fucking time this phone didnt ring during the morning  
I HaHa the first time that phone didnt ring  
W Oh hum  
I Well I was waiting to call—I was going to wait—you know—before I called you so I knew we had everything together and we were ready—you know  
W Yea  
I and we are  
W All right so let me get to him now  
I So how long you think  
W I dont know—let me see—you know  
I hah  
W It should be in short order—I hope  
I Have you talked—did you talk to him last night and everything and explained to him what was going on  
W No, No, No I aint bothered—I left and went out for a while you know  
I Oh huh  
W just rapped  
I Okay well, I'd like to do this as soon as we can  
W Yea well shit  
I You would too—huh  
W Yea  
I OKay  
W OKay baby  
I How long you going to be before you call  
W Id be getting back to you shortly  
I OK



*Transcript of Government's Exhibit 2*

W You know I got to get myself together and shit,  
you know  
I Oh Kee dook  
W All right  
I Talk to you shortly then  
W Right  
I bye bye  
W bye

Call #17

Informant Hello

Wingate It's me baby

I Huh

W Its Frank

I Hey what's happening

W Everything is all right—I just talked to the boy

I Well dam good

W So err

I So when can we do it

W I . . gonna . . I got a fella—I'll get to meet him  
about 3:30

I You gonna to meet him at 3:30

W Yea (inaudible) in fact he's gonna call me back  
here at 3:30 when—ah—when he's on his way, you  
know, to talk to me, you know.

I Yea

W All right

I Oh hun

W But err—let me see—I tell you what I want you  
to do err—meet me up at the Crotona Bar first

I When

W En—Be up there by—by I say—quarter to four,  
four O'clock

I about quarter to four

W four O'clock yea

*Transcript of Government's Exhibit 2*

I Okay and, and I'll just—when we get things set-up  
—I just have—I'll just call the dude and have  
him bring the money and shit

W Yea—well we could have just went on and save  
time anyway

I Oh you want me just you know bring everything  
with me.

W Yea this way, just we gonna save time

I Okay

W cause then you know when the dude (inaudible) we  
just lay right here in the Crotona Bar for a time  
being you know.

I Okay

W and then

I four o'clock then

W Right

I Okay

W Okay

I That will sure enough—boy you tickle me to death  
calling back

W All right

I Okay

W You wanna, you wanna come on up to the house,  
either one.

I Well I tell you what we'll do, we'll come to the  
Crotona Bar and I'll, I'll leave from there and I'll  
come on up to the house you know

W Yea

I and I'll, I'll let you know that were there and  
everything

W All right

I You gonna be at your house

W yea Or call me

I Okay

W Okay

I Oh kee doke—talk to you in a little bit

*Transcript of Government's Exhibit 2*

W All right  
I Bye, Bye  
W Okay—bye

(30 second pause in tape)

Call #18

W=Wingate

I =Informant

W Hello.

I Hello. What's you doing?

W Hey — nothing — setting here watching the news and nodding off.

I HA HA What you doing that for?

W Hum (inaudible) Hey, I don't know who's the most tired, me or that little baby.

I HA HA

W He's knocked out (inaudible)

I Probably you partner and there

W Yea, well he's out already.

I Is that right?

W Yea.

I Well, listen, err, they showed up and I got some money err — can you set that thing up for tomorrow?

W Well, listen. Why don't you do this here?

I O.K.

W Err — since I gonna have to be going uptown anyway, right?

I You going up town, yea?

W Yea — so, why don't you do this — err — would, what like what kind of money you got?

I Err.

W For what, you know.

I Err, the same thing we're trying to buy an eighth.

*Transcript of Government's Exhibit 2*

- W Yeah, well did this, err, I thought you was talking about another thing, you know.
- I Yeah I was, too, but you know he came.
- W No, no, I'm not talking about that purer thing.
- I YEAH, okay, okay.
- W Err — no cause he.
- I Yeah, I know what you talking about.
- W (inaudible) for the pieces off, you know.
- I Yeah.
- W Err, — 'cause what I was gonna do is, I thought (inaudible) you was gonna do on, on that piece work. I was just going to tell you to bring that money on up to me and drop it off and then I just go on, you know.
- I Oh, huh.
- W And hook that up and get me.
- I Yeah.
- W You know.
- I Well, what, what we wanted to do is, you know, just do it as quick as we can and get the fuck out of here, you know, 'cause, err, I don't want to be getting, you know, nothing happening like happened the other day.
- W Yeah.
- I You know, that's for sure.
- W (sigh).
- I You know, I don't want no kind of bull shit like that coming down at all — being — you know — I don't want nobody following me around and nothing.
- W Well, listen, do you want to do it like this here, put part of it in my hand till I get, you know, make the final, you know, the whole thing together and then just call you when the whole, when the other part, you know, the final arrangements come off.
- I Well, I tell you it would be easier if we just met once, you know, like if you can get it together, I'll



*Transcript of Government's Exhibit 2*

come and bring you the money and boom and I'll be gone.

W Yeah.

I You know, that will be that would be the best for me and that would make my man, you know, my friend here, feel better.

W Yeah, well, I can dig what your saying about him.

I Well, it, you know, that just be the easiest, you know — if you could just, you could just call me and tell me a place somewhere or something, you know, and that way nobody knows anything about it or nothing, you know, it just be one meeting and boom we can do it and I'll be gone and your'll be gone.

W Yeah — Oh (sigh)

I Wake up dude — it's too fuckin' early.

W Where you at?

I For you to be asleep, I'm in a motel room.

W Where at the same place

I Yeah.

W Oh — err

I So what do you think — hey, you couldn't get into that guy with the cheaper thing, could you?

W I don't know

I Hum.

W You know cause (inaudible)

I 'cause that be better, I'd, you know, that cause you know with the money we got and everything, we got it to do but you know we just a little short in money and you know it would be better if we could do the cheaper thing.

W Yeah, but err.

I But, if we can't, we can't, you know.

W Yeah—all I can do is go on and, err, try and do that.

I Yeah—well, you know, talk to him and see—you know just keep that in mind.

W hum.

*Transcript of Government's Exhibit 2*

- I You know, which ever, you know, I'd like to save some money if we could but if we can't, you know, we'll spend it.
- W Yeah—I see—all right, well, okay, I'm waiting for the baby to wake up now.
- I Oh, huh.
- W And then when he wakes up I'm going to take him home, you know.
- I Yeah.
- W And then when I'm up there, I'll see what I can do on that thing, you know.
- I All right.
- W Cause otherwise I have to get back out here on that street right now (inaudible)
- I You don't want have to do that.
- W Huh?
- I I said you don't want to be having to do that?
- W No—I really don't.
- I You know, I don't want you to, you know, that's, can't stand nothing now.
- W Huh?
- I So what do you think?
- W Yeah, well, I guess we do it that way, otherwise what I was going to say if you want, you know, this would still be a one shot thing, you know.
- I Yeah.
- W On the way I told you—and err—but this way here we'll like. When they go on to do that, you just have and you, you know.
- I Yeah, I'd.
- W (Inaudible) with the other parts.
- I Yeah, yeah, I'll wait, you know, if you can call me when you got it together, you know, I'll just come right over then and pick it up and be headed for the fucking, headed south immediately.
- W Yeah.

*Transcript of Government's Exhibit 2*

- I I can't wait to get out of this damn city.
- W I know, what you mean.
- I I swear, ha, this is driving me up the wall—it really it.
- W All right—well, listen, let me try and get back to you; then.
- I Okay.
- W All right, I can't say exactly when, you know, what time right now.
- I Oh, hum.
- W But err—I get back.
- I Some time tonight.
- W I'll try and do that, you know.
- I Okay.
- W I just.
- I Well, I'm gonna hang around here, and I'll wait for you, you know.
- W Yeah, you got that in your hand already right?
- I Yeah, it's here.
- W Yeah, Okay.
- I I mean it's for sure, like—if. We, we gonna, err—if we're out this evening. Err we just go out, take 'um out, you know, get something to eat, go some, you know, see a couple of things or something, play tourist.
- W Yeah, but that's the thing about it; once I catch up with him.
- I Okay.
- W You know, I don't, I don't want err, lose him. That's why I said you should go on and—hey, listen it's this way here, if I showed him half of the cash, then there'll know this ain't no BS or nothing involved because
- I Well, there ain't.
- W You know, but see this is one of the people I'd have, I know, I know, what it is.

*Transcript of Government's Exhibit 2*

- I You know like I ain't going, I wouldn't tell you, I wouldn't tell you to do it.
- W No—but see now—what I'm saying now—suppose I run into them same people, you know.
- I Yeah.
- W That err, that reneged thing went on.
- I Yeah.
- W The last time, then, I know what they going to say. They going to say, "Oh, man, what is this?" you know.
- I Yeah—Okay—yea, I see that.
- W Yeah.
- I But, err.
- W Yeah, but okay will do.
- I Yeah—just—you know if we could do it tomorrow some time, that would be better. Then I could, you know, we could play around some tonight and go to go out, you know, 'cause I've been here with my old lady and fucking around, you know. Last time we came to New York we didn't do shit, you know, we been playing tourist and I'd, you know, we like to go see a show or something tonight. We even thought about going to that soccer match tonight.
- W Oh, yeah.
- I With err, Argentina and Italy or something.
- W Yeah?
- I That World Soccer Match.
- W Yeah.
- I We were thinking about doing that, you know. But, I'll hang around here and wait for you to call me back though instead.
- W All right we'll listen.
- I Yeah?
- W I tell you what that Soccer Match came off what 9:30-9 o'clock, something like that.



*Transcript of Government's Exhibit 2*

- I Something like that.
- W Well, what I'll do is this here, I'll try and get back to you—in—let see it's about two minutes to seven now.
- I Um hum.
- W I'll try and get back to you in err—as soon as possible—least I'll try and get back before about mine.
- I Okay.
- W And then after that, well, err, it will be in the err, it be later on.
- I Alright.
- W You know, what I mean?
- I Okay, if you don't call before then, I'll be—I'll be here later on.
- W Yeah—but see that's the thing about it—I wish there was somebody, you know—that I could just say hey, we'll come on with me whatever it is, you know.
- I Oh, huh, well, you know like if you—hum—
- W Yeah, that's that's the whole thing if I run into him tonight, then otherwise it might run into a late thing tomorrow and then all night.
- I Err.
- W (inaudible) all over again.
- I Yeah—well, I'd—you know—oh, let me see. Yeah, I'd like to do it tomorrow if we could, you know.
- W Yeah, but (inaudible)
- I 'cause we're going to have to spend the night here anyway, and I don't want to keep the package.
- W Yeah.
- I 'is one thing. I don't want to hold on to that bitch overnight or anything.
- W Yeah.
- I You know, I'd just like to get it and get the fuck out of Dodge, immediately.

*Transcript of Government's Exhibit 2*

W Yeah, but err—just I can do, do it tonight, Well, you know, I may. I—seven o'clock tomorrow afternoon maybe.

I Seven o'clock tomorrow afternoon.

W Yeah as it stand now

I That will be fine

W You know

I That would be great

W You know

I That really would—cause that way I wouldn't have to keep hold of that thing tonight.

W Yeah.

I And fuck around

W (inaudible) well, that's good enough, you know

I Yeah.

W Well, err, what I do I might even get back to you later on this evening.

I Okay, what ever you feel like doing.

W Yeah.

I You know, but you know, you just, all you need to do is just call me up and tell me.

W Well, err, that thing is still working on the same order, though.

I On what—what order is that?

W That price thing

I How you mean?

W You know?

I Oh, the same money

W YEAH.

I Well, we could, you know, we got enough to do it just barely.

W Yeah

I ha, ha.

W Yeah

I You know, we, we got like sixty three fifty or sixty four is what his got and that's total.

*Transcript of Government's Exhibit 2*

W Yeah.

I And we gotta, we gotta our, we gotta get our asses back but that's not, you know, I got my truck, so

W Yeah.

I That's not going to cost too much.

W Yeah.

I Well, it's only going to cost us 50 or 75 dollars to drive back—so—yeah.

W Yeah.

I You know we're all right on that—it's just—we just going to have to be a little tight. Ha, ha.

W Yeah

I But, I've done that before, too.

W Yeah.

I Everybody has, yeah, that will be good, I'm glad.

W All right so—I'll just—

I So just.

W I'll rapp with you and then I'll—what I'll—I might see you earlier than that, you know, what (inaudible)

I Okay.

W Then, I'll have to go on and make my runs, you know, about and then just meet you whatever, you know.

I Yeah—you can name you know just tell me a place.

W Yeah.

I Whatever you'd like, you know

W Yeah.

I And I'm hoping we can, you know—huh—keep me into consideration.

W Yeah, well—I'll do that

I I know

W Yeah

I Okay

W Yeah

*Transcript of Government's Exhibit 2*

I     That's good  
W     All right then  
I     Okay good  
W     All right  
I     Talk to you later  
W     Alright, now  
I     Bye, Bye, now  
W     Bye.



TF:ko

AFFIDAVIT OF MAILING

State of New York )  
                              : ss.:  
County of New York)

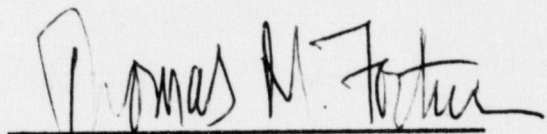
THOMAS M. FORTUIN being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 13th day of May, 1975  
he served a copy of the within brief  
by placing the same in a properly postpaid franked  
envelope addressed:

Barlow, Katz & Barlow  
233 Broadway  
New York, N.Y. 10007

William Gallagher, Esq.  
509 United States Courthouse  
Foley Sq.  
New York, N.Y. 10007

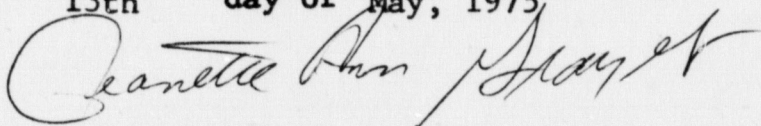
And deponent further says that he sealed the said en-  
velope and placed the same in the mail drop for  
mailing the United States Courthouse, Foley  
Square, Borough of Manhattan, City of New York.



THOMAS M. FORTUIN

Sworn to before me this

13th day of May, 1975



JEANETTE ANN GRAYER  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Commission Expires March 30, 1977